

1982-3

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-204907

DATE: October 21, 1981

MATTER OF: James M. Smith, Inc.

DIGEST:

Protest to GAO will not be considered where the firm's initial protest to the contracting agency was not filed in a timely manner.

James M. Smith, Inc., protests the rejection of its bid under invitation for bids N62474-81-B-2300, a small business set-aside issued by Department of the Navy for bus service at the Mare Island Naval Shipyard. The bid, which was the only one received, was rejected and the invitation therefore canceled because Smith failed to acknowledge an amendment to the invitation adding a Department of Labor wage rate determination. Smith contends that it in fact mailed acknowledgement of the amendment 10 days before bids were to be opened; that the wage rate determination would have made little or no difference in its bid price; and that it should be sufficient that Smith acknowledged receipt of the amendment when, after bid opening, the firm was advised of the problem with the bid. Smith also protests the Navy's decision not to set the resolicitation for the requirement aside for small business.

The protest is dismissed as untimely.

Bid opening originally was scheduled for June 11, 1981, and Smith submitted its bid on time. On June 12, Smith received Amendment 0001 postponing bid opening indefinitely pending the receipt of a wage rate determination from the Department of Labor. The next day, Smith received Amendment 0002, which furnished the wage rate determination and set bid opening at June 23.

On June 24, the Navy advised Smith that the firm's bid was nonresponsive because of the failure to acknowledge Amendment 0002, and that the requirement would be resolicited on an unrestricted basis to generate competition. Smith complained to the contracting activity's commanding officer by letter of July 28, but in a letter dated August 13 the commanding officer's representative

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sustained the decision to reject the bid and not to set the procurement aside on resolicitation. Bids were opened under the resolicitation on September 3.

Section 21.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. part 21 (1981), requires that a protest such as Smith's be filed with either the contracting agency or the General Accounting Office within 10 working days after the basis for protest is known or should have been known, whichever is earlier. Smith knew the bases for its protest on June 24. Assuming that the firm's July 28 letter to the contracting activity's commanding officer was intended to be a bid protest, it was untimely filed under section 21.2(b) of our Procedures. We also note that the protest to our Office was received on September 25, over one month after the Navy's response to Smith's July 28 letter. In this respect, Section 21.2(a) of our Procedures requires that even if a firm has filed a timely protest with the contracting agency, any subsequent protest to our Office must be filed within 10 working days after the agency's initial adverse action.

In any case, we consistently have held that a bidder's failure to acknowledge an amendment which modifies or adds a wage rate determination may not be waived. The reason is that the Government's acceptance of a bid which does not contain an agreement to pay the appropriate wage rates does not bind the contractor to pay the wages to which its employees are entitled, and the Government may not waive the employees' right to those wages. See Moltzen Electric, Inc., B-201364, April 6, 1981, 81-1 CPD 261. It does not matter that the bidder allegedly mailed acknowledgement of the amendment in what it assumed would be sufficient time before bid opening, since the bid as opened must actually include the acknowledgement, and the bidder has the responsibility to assure that the acknowledgement is timely received. See United States Cartridge Company, B-200481, February 11, 1981, 81-1 CPD 94. Also, a bidder's post-bid opening agreement to abide by an unacknowledged amendment's wage rate determination cannot make the bid acceptable since a bid that is not responsive at bid opening may not be made responsive afterward. See Jack Young Associates, Inc., B-195531, September 20, 1979, 79-2 CPD 207.

Further, there is nothing in the Small Business Act which mandates that any particular procurement be set aside. See American International Rent-A-Car, B-194577, May 10, 1979, 79-1 CPD 333. Rather, the decision is within the contracting officer's discretion, based on whether there is a reasonable expectation of adequate competition from small

business concerns that the award will be at a reasonable price. Defense Acquisition Regulation § 1-706.5 (1976 ed.). We have recognized that the agency's procurement experience regarding the item necessarily is important in reaching its decision. See Burrelle's Press Clipping Service, B-199945, March 2, 1981, 81-1 CPD 152.

The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel